Tan Sri Abdul Rahim bin Datuk Thamby Chik v John Marcom & Ors (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–23–51 OF 1998
RAHMAH HUSSAIN J
19 OCTOBER 1999

Civil Procedure *— Service — Defendant resident abroad — Publishing permit issued to agent in Malaysia — Whether leave of court needed to be obtained to issue writ — Whether writ could be served on agent in Malaysia — Rules of the High Court 1980 O 6 r 1(1) & O 10 r 1(1) — Printing and Publication Act 1984 ss 6(3) & 23(a)*

Newspapers *— Publication permit — Publishing permit issued to agent in Malaysia — Whether leave of court needed to be obtained to issue writ against publisher — Whether writ could be served on agent in Malaysia — Rules of the High Court 1980 O 6 r 1(1) & O 10 r 1(1) — Printing and Publication Act 1984 ss 6(3) & 23(a)*

The plaintiff sued the defendants for libel for an article published in *The TIME Magazine* ('the magazine'). The first and second defendants were sued in their capacity as publishers and/or proprietors of the magazine, the third defendant, as the editor of the magazine and the fourth defendant, as the writer of the article. From the publishing permit of the magazine, issued by the Malaysian Government, the plaintiff discovered one Miss Christine Chong was the agent of the publishers of the magazine in Malaysia and proceeded to serve the writ of summons and the statement of claim on her in her capacity as the representative of the first, second and third defendants. The defendants were successful in their application to set aside the writ of summons against them pursuant to O 12 r 7 of the Rules of the High Court 1980 ('the RHC'). The plaintiffs now appealed against the decision of the senior assistant registrar and contended that service on the agent appointed under s 6(3) of the Printing Presses and Publication Act 1984 ('the Act') was properly made pursuant to s 23(1) of the Act as the first and second defendant were named as proprietors of the magazine in the publication permit whereas for the third defendant, the writ was served through Miss Christine Chong on the basis that as editor of the magazine, the third defendant was an integral part of the first and second defendants and was sued for the third defendant's role in the magazine. The defendants however contended that the plaintiff had not complied with O 6 r 6(1) and O 11 r 4 of the RHC by obtaining leave of the court to issue the writ of summons against all four defendants who were resident abroad. The defendants also contended that since the plaintiff's claim was not in relation to a contract, service on the agent pursuant to O 10 r 2 of the RHC was not applicable and the plaintiff was not entitled to rely on s 23 of the Act to serve the writ on the agent appointed pursuant to the Act. Further, Miss Christine Chong was an agent for the first defendant only; therefore, she could not be deemed to be an agent of the second and third defendants.

Held, allowing the appeal with costs:

(1) Order 6 r 6(1) and O 11 r 4 of the RHC were not applicable because the words 'subject to the provisions of any written law' in O 10 r 1(1) of the RHC clearly envisaged that other laws may provide for service outside the situation stated in the RHC. In the present case, the provisions relating to service were clearly provided for in the Act, namely s 23(a) and s 6(3) of the Act (see p 189B).

(2) It was evident from the clear and unequivocal words of the Act that Parliament intended the proprietors of foreign publications to be accountable for publications which are imported and circulated within the jurisdiction. As a publication permit was issued to the magazine, all legal consequences which follow from the issuance of such a permit would apply including the service of legal proceedings on the agent appointed pursuant to the Act (see p 189E–G). The service of the writ on the third defendant through the agent was proper as the third defendant was an integral part of the first and second defendants and he was sued for his role in the magazine (see p 190A).

[Bahasa Malaysia summary

Defendan telah menyaman defendan-defendan untuk libel bagi suatu rencana yang diterbitkan di dalam *The TIME Magazine* ('majalah tersebut'). Defendan pertama dan kedua telah disaman di dalam kapisiti mereka sebagai penerbit dan/atau pemilik-pemilik majalah tersebut dan defendan ketiga, sebagai editor majalah tersebut dan defendan keempat, sebagai penulis rencana tersebut. Daripada permit menerbitkan majalah tersebut, yang dikeluarkan oleh kerajaan Malaysia, plaintif mendapat tahu bahawa seorang bernama Cik Christine Chong adalah ejen penerbit majalah tersebut di Malaysia dan terus menyerahkan writ saman dan pernyataan tuntutan ke atasnya di dalam kapisitinya sebagai wakil defendan pertama, kedua dan ketiga. Defendan-defendan tersebut berjaya di dalam permohonan mereka untuk mengetepikan writ saman terhadap mereka menurut A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Kini plaintif-plaintif merayu terhadap keputusan penolong kanan pendaftar dan menegaskan bahawa serahan kepada ejen yang dilantik di bawah s 6(3) Akta Mesin Cetak dan Penerbitan 1984 ('Akta tersebut') telah dibuat dengan teratur menurut s 23(1) Akta tersebut kerana defendan pertama dan kedua telah dinamakan sebagai pemilik-pemilik majalah tersebut di dalam permit penerbitan, sementara untuk defendan ketiga, writ telah diserahkan melalui Cik Christine Chong di atas dasar bahawa sebagai editor majalah tersebut, defendan ketiga adalah sebahagian daripada defendan pertama dan kedua dan telah disaman untuk peranan defendan ketiga di dalam majalah. Tetapi defendan-defendan menegaskan bahawa plaintif tidak mematuhi A 6 k 6(1) dan A 11 k 4 KMT dengan memperolehi

kebenaran mahkamah untuk mengeluarkan writ saman terhadap semua defendan-defendan yang tinggal di luar negeri. Defendan-defendan juga menegaskan bahawa oleh kerana tuntutan plaintif bukan berkenaan dengan suatu kontrak, serahan kepada ejen menurut A 10 k 2 KMT tidak terpakai dan plaintif tidak berhak untuk bergantung kepada s 23 Akta tersebut untuk menyerahkan writ ke atas ejen yang dilantik menurut Akta tersebut. Selanjutnya, Cik Christine Chong adalah ejen untuk defendan pertama sahaja; oleh itu, beliau tidak boleh dianggap sebagai ejen untuk defendan kedua dan ketiga.

Diputuskan, membenarkan rayaun-rayuan tersebut dengan kos:

(1) Aturan 6 k 6(1) dan A 11 k 4 KMT tidak terpakai kerana perkataan-perkataan 'tertakluk kepada peruntukan undang-undang' di dalam A 10 k 1(1) KMT jelas memperuntukkan bahawa undang-undang lain boleh memperuntukkan untuk serahan di luar keadaan yang dinyatakan di dalam KMT. Di dalam kes ini, peruntukan-peruntukan berkenaan dengan serahan telah jelas diperuntukkan oleh Akta tersebut, iaitu ss 23(a) dan 6(3) Akta tersebut (lihat ms 189B).

(2) Adalah terbukti daripada perkataan-perkataan yang jelas dan tidak taksa Akta tersebut bahawa Parlimen niatkan pemilik-pemilik penerbitan asing untuk bertanggungjawab bagi penerbitan yang diimport dan disebarkan di dalam bidang kuasanya. Oleh kerana permit penerbitan dikeluarkan kepada majalah tersebut, semua akibat undang-undang yang berikutan daripada pengeluaran permit sebegini akan terpakai termasuk serahan prosiding undang-undang ke atas ejen yang dilantik menurut Akta tersebut (lihat ms 189E–G). Serahan writ ke atas defendan ketiga melalui ejen tersebut adalah wajar kerana defendan ketiga adalah sebahagian daripada defendan pertama dan kedua dan beliau disaman untuk peranannya di dalam majalah tersebut (lihat ms 190A).]

Notes

For cases on service on foreign defendant, see 2(2) *Mallal's Digest* (4th Ed, 1999 Reissue) paras 4082–4084.

For cases on service out of jurisdiction see, 2(2) *Mallal's Digest* (4th Ed, 1999 Reissue) paras 4102–4126.

Legislation referred to

Printing Presses and Publication Act 1984 ss 6(3), 23(a)

Rules of the High Court 1980 O 6 r 1(1), O 10 rr 1(1), 2, O 11 r 4, O 12 r 7(1)

Firoz Hussein (*Puthucheary Firoz & Asmet*) for the plaintiff.

L Cheah (*Shearn Delamore & Co*) for the first to third defendant.

Rahmah Hussain J: This appeal arises from the decision of the senior assistant registrar given on 15 January 1999, in allowing the application by the defendants to set aside the writ of summons in this action against the first, second and third defendants (hereinafter referred to collectively as 'the defendants') pursuant to O 12 r 7 Rules of the High Court 1980 ('the RHC').

The salient facts as contended by the plaintiff are as follows: *The TIME Magazine*, Asian Edition is a magazine published and distributed in Malaysia. The first and second defendants are the publishers and/or proprietors of *The TIME Magazine*. The third defendant is the editor of *The TIME Magazine*. A publication permit has been issued to allow for the publication of *The TIME Magazine* in Malaysia (exh 'ARTC-7' - encl 15). *The TIME Magazine* issue of 15 June 1998 contained defamatory allegations in respect of the plaintiff in an article entitled 'How Malaysia throttles dissent' ('the article'). A letter of demand dated 13 July 1998 was sent by the plaintiff's solicitors to the defendants in respect of the article (exh 'ARTC-I' - encl 15). By letter dated 16 July 1998 Messrs Johnson Stokes & Master, a firm of solicitors in Hong Kong replied on behalf of 'the publisher of *The TIME Magazine*, Asian Edition' which was stated in the said letter as being 'TIME Inc, Asia' and Donald Morrison, the Chief Editor of *The TIME Magazine*, denying liability (exh 'ARTC-2' - encl 15).

Following the letter from Messrs Johnson Stokes & Master stating that the publisher is in fact TIME Inc, the plaintiff has sought to clarify the ambiguity as to whether the first defendant or Time Inc is the publisher of *The TIME Magazine*. A letter dated 6 August 1998 was then sent to Messrs Johnson Stokes & Master. In the same letter the plaintiff's solicitors informed Messrs Johnson Stokes & Master that in the event no reply was received within the time stipulated then they would have to effect service pursuant to s 23 of the Printing and Publication Act 1984 ('the Act'). However no reply was received (exh 'ARTC-4' - encl 15).

The plaintiff's solicitors also wrote repeatedly to Messrs Johnson Stokes & Master inquiring as to whether the defendants had appointed agents in Malaysia to accept service of legal proceedings on their behalf but received no reply as well (exh 'ARTC-3' and 'ARTC-4' - encl 15). In the meantime the Ministry of Home Affairs supplied the plaintiff's solicitors with a copy of the publication permit issued to the magazine.

On 1 August 1998, the plaintiff filed a writ of summons and statement of claim against all four defendants for defamation. Then on 17 September 1998 the plaintiff received a letter from the Ministry of Home Affairs confirming that Miss Christine Chong is the agent of *The TIME Magazine* in Malaysia. Finally on 24 September 1998 the writ of summons and the statement of claim was served on Miss Christine Chong in her capacity as the representative of the defendants in Malaysia.

It is the plaintiff's contention that service on the agent appointed under s 6(3) of the Act was properly made pursuant to s 23 of the Act. Now s 23(a) of the Act provides as follows:

> Any notice, document or other correspondence shall be deemed to be sufficiently communicated to the holder of a licence, permit or certificate if such notice, document or correspondence —
>
> (a) is personally served on the person in charge at the premises where the printing press is located, where the publication is published, or upon the agent appointed under sub-s (3) of s 6;

While s 6(3) of the same Act provides:

> The Minister may impose as a condition of the grant of a permit that the proprietor of the newspaper in Singapore shall establish and maintain a place of business within Malaysia or shall appoint persons within Malaysia authorised to accept service of any notice or legal process on behalf of the proprietor and shall furnish the Minister with, and cause to be published in such manner as the Minister may direct, a list containing the names and addresses of such persons.

Miss Christine Chong in her affidavit in reply does not deny that she is the agent named in the publishing permit issued by the Malaysian Government (para 4 - encl 17). According to learned counsel for the plaintiff, the service of the legal process was valid, because the first and second defendants were named as proprietors of *The TIME Magazine* in the publication permit. And as for the third defendant, the writ was served through Miss Christine Chong on the basis that as editor of *The TIME Magazine*, he is an integral part of the first and second defendants and was sued for his role in *The TIME Magazine*.

On behalf of the defendants it is submitted that the service of the writ of summons and statement of claim on The TIME Magazine Services Sdn Bhd does not constitute a valid service on the defendants. They say that there has been a breach of O 6 r 6(1) and O 11 r 4 of the RHC, whereby the plaintiff has failed to obtain leave of the court to issue the writ of summons against all four defendants, since they are resident abroad. It is further submitted that the plaintiff's failure to obtain leave of the court to issue the writ, for service out of court's jurisdiction has rendered the writ void and should be struck out.

With regard to service on the agent in Malaysia, it is the defendants' contention that the plaintiff's claim against them is not in relation to a contract and therefore O 10 r 2 RHC is not applicable. The permit issued by the Home Ministry is addressed to the first defendant and not to the second and third defendants. Since Miss Christine Chong is the agent of the first defendant, she cannot be deemed to be an agent for the second and third defendants. Therefore the defendants say, the plaintiff is not entitled to rely on s 23 of the Act, to enable him to serve the writ on Miss Christine Chong or The TIME Magazine Services Sdn Bhd and thereby to consider such service as valid and proper.

As I see it, the defendants' grounds of appeal are essentially twofold. First, that the plaintiff has not complied with O 6 and O 11 of the RHC, pertaining to the procedure for service on defendants resident abroad; second, that the plaintiff is not entitled to rely on s 23 of the Act, to serve the writ on the agent appointed pursuant to the Act, in Malaysia.

A As regards the first ground, let us now look at O 10 r 1(1) RHC which states:

> *Subject to the provisions of any written law* and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address. (Emphasis added).

B In my opinion, the words 'subject to the provisions of any written law' clearly envisage that other laws may provide for service outside the situation stated in the RHC. In the present case, the provisions relating to service are clearly provided for in the Act, namely s 23(a) and s 6(3) of the Act. Therefore I am satisfied that O 6 r 6(1) and O 11 r 4 of the RHC are not C applicable in this case. That brings us to the defendants' second ground, that is, that the plaintiff is not entitled to rely on s 23 of the Act, as the agent Miss Christine Chong is an agent for the first defendant only and that she cannot be deemed to be an agent for the second and third defendants. Furthermore s 6(3) of the Act, does not provide for the appointment of an agent for the purpose of 'legal process' when the newspaper is not published D in Singapore.

I have this to say. In view of the fact that the defendants have not disputed exh 'ARTC-7' - encl 15 which is a publication permit (Singapore) and that Miss Christine Chong in her second affidavit sworn on 3 December 1998 (at para 4 - encl 17), has acknowledged that she is the E agent named in the publication permit, it is my considered opinion that a publication permit (Singapore) was issued to *The TIME Magazine* and that all legal consequences which follow from the issuance of such a permit should apply, including service of legal proceedings on the agent appointed pursuant to the Act.

F Furthermore, there is nothing in s 6(3) of the Act to require the newspaper to be 'published in Singapore' as contended by the defendants. In any event, it is a well known fact, which this court can take judicial notice of, that *The TIME Magazine*, Asian Edition, is published throughout Asia, including Malaysia, Singapore and Hong Kong.

G It is also evident from the clear and unequivocal words of the Act that Parliament intended the proprietors of foreign publications to be accountable for publications which are imported and circulated within the jurisdiction.

In respect of service on the second defendant, since the name and address of the permit holder on exh 'ARTC-7' - encl 15 is stated as 'John H Marcom, Time Incorporated', and that the defendants' solicitors in their letter dated 16 July 1998 (exh 'ARTC-2' - encl 15) had replied on behalf of the publisher of *The TIME Magazine*, Asian Edition which was stated in the said letter as being 'Time Inc, Asia' and Donald Morrison (third defendant) as the chief editor of *The TIME Magazine*, I accept learned counsel for the plaintiff's submission that 'in an abundance of caution' they have named I both John Marcom and Time Inc, Asia as being the publishers of *The TIME Magazine*. As such I am satisfied that the service effected on the agent Miss Christine Chong is good service, as well.

In respect of service on the third defendant, again, from the same letter (exh 'ARTC-2') the defendants have named him as the 'Chief Editor of *The TIME Magazine*' Therefore to my mind, since he is an integral part of the first and second defendants, he is being sued for his role in *The TIME Magazine*. As such I am also satisfied that service on the agent Miss Christine Chong on his behalf is also proper service.

In the circumstances, I was satisfied that the plaintiff has complied with the requirements as stipulated in the Act for the proper service of legal process. As such I allowed the plaintiff's appeal with costs.

Appeal allowed with costs.

Reported by Chin En Tek